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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA**

13
14 Nicole Romano and Jonathan Bono,
15 on behalf of themselves and all
16 others similarly situated,

16 Plaintiffs,

17 v.

18 SCI Direct, Inc. and DOES 1 to 50,
19 inclusive,

20 Defendants.

No. 2:17-cv-03537-ODW-JEM

**SCI DIRECT'S AMENDED
OPPOSITION TO PLAINTIFFS'
MOTION FOR CLASS
CERTIFICATION PURSUANT
TO F.R.C.P. 23(B)(2) AND 23(B)(3)**

Assigned to: Hon. Otis D. Wright, II

Hearing: December 4, 2017
Time: 1:30 p.m.
Courtroom: 5D

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I. PERTINENT FACTUAL INFORMATION

At the same time Plaintiffs moved for California class certification under Rule 23, Plaintiffs also moved for the conditional certification of a national class under the FLSA. In support of both motions for certification, Plaintiffs attempt to rely on the same recitation of misstated “facts.” In its Opposition Brief to Plaintiffs’ Motion for Conditional Class Certification, SCI Direct analyzes in detail the mischaracterizations within Plaintiffs’ “facts,” and sets forth the pertinent facts necessary to resolve both of Plaintiffs’ certification motions. To avoid a repetitive read and unnecessary duplication, that factual analysis and detail will not be cut and pasted here, and is instead specifically incorporated herein by this reference. *See* SCI Direct Opposition Brief to Plaintiffs’ Motion for Conditional Class Certification (Doc. 68) at Section I, pgs. 1-8, and **Exhibits 1-8** attached hereto.

II. EMPLOYEE MISCLASSIFICATION IN CALIFORNIA

The class certification analysis requires a “rigorous analysis” that frequently “will entail overlap with the merits of the plaintiff’s underlying claim.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011). “Although in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true, the court also is required to consider the nature and range of proof necessary to establish those allegations.” *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982) (citations omitted).

The crux of Plaintiffs claims rest on the mistaken belief that SCI Direct misclassified ISRs as independent contractors instead of employees. *See* Doc. 62-1 at 1. The California common law test for determining whether an individual is an employee or an independent contractor is set forth in *S. G. Borello & Sons*,

1 *Inc. v. Dep't of Indus. Relations*, 769 P.2d 399, 404 (Cal. 1989). “The principal
2 test of an employment relationship is whether the person to whom service is
3 rendered has the right to control the manner and means of accomplishing the
4 result desired.” *Id.*

5 While the right to terminate at-will is the first factor analyzed under the
6 *Borello* test, “a termination at-will clause for both parties may properly be
7 included in an independent contractor agreement, and is not by itself a basis for
8 changing that relationship to one of an employee.” *Arnold v. Mutual of Omaha*
9 *Ins. Co.*, 202 Cal.App.4th 580, 589 (Cal. App. 2011) (holding that insurance
10 agent was properly classified as independent contractor where she was required
11 by state to obtain a license to sell insurance, was responsible for her own
12 instrumentalities and tools, and was paid chiefly on commissions). Further,
13 *Borello* identified several other indicia indicating whether or not an employment
14 relationship exists:

15 (a) whether the one performing services is engaged in a distinct
16 occupation or business; (b) the kind of occupation, with reference to
17 whether, in the locality, the work is usually done under the direction
18 of the principal or by a specialist without supervision; (c) the skill
19 required in the particular occupation; (d) whether the principal or the
20 worker supplies the instrumentalities, tools, and the place of work for
21 the person doing the work; (e) the length of time for which the
22 services are to be performed; (f) the method of payment, whether by
23 the time or by the job; (g) whether or not the work is a part of the
24 regular business of the principal; and (h) whether or not the parties
25 believe they are creating the relationship of employer-employee.

1 *Id.* These factors “[g]enerally . . . cannot be applied mechanically as separate
2 tests; they are intertwined and their weight depends often on particular
3 combinations.” *Id.*

4 Even with independent contractors:

5 [A] company may "retain a broad general power of supervision and
6 control as to the results of the work so as to insure satisfactory
7 performance of the independent contract—including the right to
8 inspect . . . the right to make suggestions or recommendations as to
9 details of the work . . . the right to prescribe alterations or deviations
10 in the work—without changing the relationship from that of owner
11 and independent contractor or the duties arising from that relationship.

12
13 *Hennighan v. Insphere Ins. Sols., Inc.*, 38 F. Supp. 3d 1083, 1100 (N.D. Cal.
14 2014), *aff'd*, 650 F. App'x 500 (9th Cir. 2016) (citation omitted).

15 In *Hennighan*, the court found that an insurance sales agent was an
16 independent contractor instead of an employee based on the following evidence:
17 (1) the agent established his own work schedule; (2) he chose which policies he
18 wanted to sell; (3) he was not required to sell certain number of policies within
19 given time period or to generate specific amount of revenue; (4) he was not
20 required to work specified number of hours; (5) he could set his own
21 appointments or choose not to work at all; (6) he could determine whether he
22 would interact with clients in person or by telephone and whether he would seek
23 leads internally or through membership programs; (7) he was not monitored or
24 supervised by company; (8) he was not subject to formal or informal reviews; (9)
25 he worked outside the office at least 50% of the time; (10) his training was

1 mostly voluntary; (11) he took rest and lunch breaks at will; and (12) he did not
2 have any guaranteed vacation. *Id.* at 1100-01.

3 Nearly every factor in *Heningham* is present here. ISRs have complete
4 control over their schedules, hours, the location and methods by which they made
5 sales, and the number of sales they wished to make in a given period. *See e.g.*,
6 Plaintiffs' Exhibit 5, 6, and 30 to Friedman Decl., at ¶ 5(b). Moreover, ISR
7 trainings were optional, the ISRs could take breaks as they wished, and they
8 received no benefits or guaranteed vacation time. *Id.* at ¶¶ 5(a), 5(b).

9 **A. Class actions alleging independent contractor misclassification**

10 In the class action context, “whether the hirer's right to control can be
11 shown on a classwide basis will depend on the extent to which individual
12 variations in the hirer's rights vis-à-vis each putative class member exist, and
13 whether such variations, if any, are manageable.” *Ayala v. Antelope Valley*
14 *Newspapers, Inc.*, 327 P.3d 165, 169 (Cal. 2014). For class certification, “the
15 key question is whether there is evidence a hirer possessed different *rights* to
16 control with regard to its various hirees, such that individual mini-trials would be
17 required.” *Id.* at 174.

18 Agreements between the parties are a significant factor in assessing the
19 right of control over one's work. *Id.* at 173. However, the rights set forth in an
20 agreement “may not be conclusive if other evidence demonstrates a practical
21 allocation of rights at odds with the written terms.” *Id.* (citation omitted).
22 Therefore, in deciding whether claims that hinge on common law employee
23 status are certifiable, . . . a court appropriately may consider what control is
24 “necessary” given the nature of the work, whether evidence of the parties' course
25 of conduct will be required to evaluate whether such control was retained, and
26 whether that course of conduct is susceptible to common proof—*e.g.*, whether

1 evidence of the parties' conduct indicates similar retained rights vis-à-vis each
2 hiree, or suggests variable rights, such that individual proof would need to be
3 managed. *Id.* (citations omitted). *See also Norris-Wilson v. Delta-T Grp., Inc.*,
4 270 F.R.D. 596, 608 (S.D. Cal. 2010) ("It would be very different if [the
5 company] actually supervised some workers and not others, or supervised them
6 all but in vary degrees. Likewise, it would be very different if [the company]
7 evaluated some workers and not others, or evaluated them all but in different
8 ways. Then the Court would see the difficulty in trying to adjudicate the workers'
9 proper classification with respect to the putative class as a whole.") (cited by
10 Plaintiffs).

11 Here, the most significant issue with Plaintiffs' class is that evidence of the
12 parties' course of conduct is necessary to evaluate whether such control was
13 retained. While the independent contractor agreement signed by the parties is a
14 starting point to identify the relative rights retained by SCI Direct, those rights
15 established in the agreement can still be waived like the rights contained in any
16 other contract. Accordingly, evidence of the parties' course of conduct is
17 necessary to establish whether SCI Direct waived or retained those rights. As the
18 declarations from various sales managers show, they were the ones who regularly
19 interacted with ISRs, making decisions on whether to hire and fire depending on
20 the specific situation, deciding whether to impose certain sales goals, and
21 distributing leads according to factors within their discretion. Thus, evidence of
22 whether each sales manager retained or waived the specific rights in the
23 agreement *as to each ISR* necessarily negates any contention that SCI Direct's
24 course of conduct is susceptible to common proof.

1 **III. PLAINTIFFS SHOULD NOT BE GRANTED CLASS** 2 **CERTIFICATION**

3 The failure to satisfy any one requirement under Fed. R. Civ. P. 23 is fatal
4 to class certification. *Norris-Wilson v. Delta-T Grp., Inc.*, 270 F.R.D. 596, 602
5 (S.D. Cal. 2010). “The class action is an exception to the usual rule that litigation
6 is conducted by and on behalf of the individual named parties only.” *Dukes*, 564
7 U.S. at 348 (citation omitted). “In order to justify a departure from that rule, a
8 class representative must be part of the class and possess the same interest and
9 suffer the same injury as the class members.” *Id.*

10 “Before certifying a class, the trial court must conduct a ‘rigorous analysis’
11 to determine whether the party seeking certification has met the prerequisites of
12 Rule 23.” *Mazza v. American Honda Motor Co., Inc.*, 666 F.3d 581, 588 (9th Cir.
13 2012) (quotation omitted). This analysis requires a district court to conduct a
14 “rigorous analysis” that frequently “will entail overlap with the merits of the
15 plaintiff’s underlying claim.” *Dukes*, 564 U.S. at 351. “Although in determining
16 whether to certify the class, the district court is bound to take the substantive
17 allegations of the complaint as true, the court also is required to consider the
18 nature and range of proof necessary to establish those allegations.” *In re*
19 *Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 691 F.2d
20 at 1342 (citations omitted).

21 A party seeking class certification has the burden of establishing that each
22 of the four requirements under Rule 23(a) – numerosity, commonality, typicality,
23 and adequate representation – have been met,¹ in addition to at least one
24 requirement under Rule 23(b). *See, e.g., Dukes*, 564 U.S. at 350.

25 ¹ Defendant is not disputing whether the requirements of numerosity and
26 adequacy of representation have been met.

A. Without showing that every putative class member worked the number of hours necessary to establish a labor code violation, Plaintiffs cannot establish commonality.

To satisfy the commonality requirement of Rule 23(a), Plaintiffs must demonstrate that all class members suffered the same injury, not merely that they have all suffered a violation of the same provision of law. *See Dukes*, 564 U.S. at 350. A class meets the commonality requirement of the class certification rule when the common questions it has raised are apt to drive the resolution of the litigation. *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014). Whether a question will drive the resolution of the litigation necessarily depends on the nature of the underlying legal claims that the class members have raised. *Id.*

Plaintiffs cite to numerous cases in the Ninth Circuit, many of which are unreported, for the contention that commonality is met when a putative class asserts a misclassification claim.² Doc. 62-1 at 13-14. The facts of those cases, however, differ significantly from those in the instant matter regarding control beyond that alleged by Plaintiffs here, with several decided not in the Rule 23 class certification context, but rather on summary judgment or conditional certification under FLSA.³ For example, in *Dalton v. Lee Publications, Inc.*, 270 F.R.D. 555 (S.D. Cal. 2010), the defendant required carriers to deliver newspaper by a certain time each morning and to execute an independent contractor agreement setting forth the following: (a) the carrier's primary duties, including assembling and delivering the newspapers timely and in good condition; (b) the

² Plaintiffs' bullet point list of cases violates this district's briefing requirement of double spacing. *See* L.R. 11-3.6. This Court should strike Plaintiffs' discussion of these cases, as had they appropriately double-spaced the discussion, their Motion would exceed the 25-page briefing limit.

³ *See e.g., Hose v. Henry Industries, Inc.*, 49 F.Supp.3d 906 (D. Kan. 2014); *Arredondo v. Delano Farms Co.*, 2012 WL 1232294 (E.D. Cal. April 12, 2012); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (5th Cir. 1985).

1 carrier's obligation to supply a vehicle and equipment; (c) the carrier's pay
2 schedule; (d) the purported understanding of the parties regarding the carrier's
3 independent contractor status; (e) the penalties for excessive complaints,
4 misdeliveries, and subscription cancellations; (f) the requirement to get auto
5 insurance in specific liability amounts; (g) which party bears the risk of loss from
6 non-payment, non-delivery, and other liabilities; (h) the contract is unassignable,
7 but the carrier may hire substitutes or helpers; (i) the carrier will not attend
8 employee meetings and is free to ignore all suggestions offered by the SCI Direct;
9 (j) the manner and rate of compensation; (k) the carrier must use his or her best
10 effort to increase circulation; (l) the parties must exchange updated information
11 regarding subscriber cancellations and enrollments; (m) the duration of the
12 contract; and (n) termination rights. And, in *Villapando v. Exel Direct, Inc.*, 303
13 F.R.D. 588 (N.D. Cal. 2014), the company had control over vehicle maintenance,
14 grooming, the assignment of delivery routes, and communications with
15 customers, and kept daily logs, timesheets, and manifests. Likewise, in *Phelps v.*
16 *3PD, Inc.*, 261 F.R.D. 548 (D. Or. 2009), a carrier company controlled the
17 drivers' standards of service, employment of others to assist the driver, purchase
18 of insurance coverage, preparation of driver logs and other documents, placement
19 of marks or logos on trucks, use of trucks for business other than driving for
20 defendant, and termination. In *Smith v. Cardinal Logistics Management Corp.*,
21 2008 WL 4156364 (N.D. Cal. Sept. 5, 2008), a putative class of drivers were
22 required to form their entities within thirty days of signing agreement, required to
23 wear a uniform consisting of a shirt with The Home Depot and Cardinal logos,
24 which had to be kept tucked in and the only permissible jacket was one
25 containing The Home Depot and Cardinal logos; dispatch centers would alert the
26 drivers, through phone message, fax or, later, email or other electronic method, as

1 to the deliveries for each driver for the following day; if the drivers had any
2 problems throughout the day, including even a flat tire, they were instructed to
3 call the dispatch center. And, in *Bowerman v. Field Asset Svcs., Inc.*, 2015 WL
4 1321883 (N.D. Cal. Mar. 24, 2015), the court initially denied class certification
5 before the class definition was significantly narrowed to: “All persons who at any
6 time from January 7, 2009 up to and through the time of judgment (the “Class
7 Period”) (1) were designated by FAS as independent contractors; (2) personally
8 performed property preservation work in California pursuant to FAS work orders;
9 and (3) while working for FAS during the Class Period, did not work for any
10 other entity more than 30 percent of the time. The class excludes persons who
11 primarily performed rehabilitation or remodel work for FAS.”

12 Moreover, the only Ninth Circuit case cited by Plaintiffs in their lengthy
13 bullet-point list is inapposite. In *Jimenez*, 765 F.3d at 1163, the Ninth Circuit
14 upheld class certification where the insurance company employing plaintiff
15 adjusters switched the adjusters from salaried employees to hourly status. After
16 the change, the manager of each local office had the power to file a timekeeping
17 “exception” or “deviation” from the default expectation of 8 hours per day and 40
18 hours per week. *Id.* Each local office had a non-negotiable compensation budget,
19 which created a functional limit on the amount of overtime a manager may
20 approve. *Id.* Here, ISRs were never compensated hours, nor is it alleged that any
21 local office had any similar compensation budget; the ISRs were paid solely on
22 commission, without any allegation of an office having a limit on the commission
23 made by each ISR. *See* Plaintiffs’ Exhibit 5, 6, 30 to Friedman Decl., at ¶ 3(a).

24 Further, in a case relied on by Plaintiffs, the court importantly clarified the
25 commonality requirement as to a class of drivers classified as independent
26 contractors asserting the same wage-and-hour claims present in the instant matter,

1 explaining that while the question of whether the drivers were improperly
2 classified is common to the class, the class members must have personally made
3 deliveries for the company at some point during the class period. *Villalpando v.*
4 *Exel Direct Inc.*, 303 F.R.D. 588, 606 (N.D. Cal. 2014). Significantly, the court
5 held that “an individual who never made deliveries would not be able to establish
6 violations of at least some (if not all) of the wage and hour laws that are at issue
7 in this case,” providing an example that “an individual who never actually made
8 deliveries for [the company], instead hiring others to drive the trucks and make
9 the deliveries, could not recover damages for lost meal and rest breaks on their
10 own behalf.” *Id.*

11 Similarly, here, ISRs were free to employ assistants to help them with
12 making sales without any approval needed by SCI Directs. Ex. 4 at ¶ 16. Like in
13 *Villalpando*, if those assistants performed any tasks solely by themselves, the ISR
14 would not be able to establish violations of a least some (if not all) of the wage
15 and hour laws asserted by the putative class.

16 Further, if an ISR never worked more than eight hours per workday or forty
17 hours per week, or never more than five hours per day for purposes of meal
18 breaks, the ISR could neither establish violations of the applicable labor code
19 provision nor recover damages. To prove a failure to pay overtime compensation
20 under Cal. Lab. Code § 510, a class member must establish that he or she either
21 worked more than eight hours per day or forty hours per week. Further, to be
22 eligible for overtime wages at twice the regular rate of pay, a class member must
23 establish that he or she worked more than twelve hours on a particular day. *Id.* To
24 establish a failure to provide meal periods under Cal. Lab. Code § 512, an ISR
25 will need to demonstrate that on a particular day, he or she worked more than five
26 hours *and* that SCI Direct did not permit the ISR to take a meal break. Similarly,

1 for a failure to pay minimum wage, Cal. Lab. Code § 1194 requires proof of the
 2 hours worked by the ISR and the amount he or she was compensated. In addition
 3 to every ISR having different hours worked, the minimum wage amount differs
 4 depending on the state, county, or city in which the ISR is located. Since
 5 Plaintiffs have presented no evidence whatsoever that ISRs in the putative class
 6 actually worked the requisite amount of hours necessary to establish Cal. Lab.
 7 Code violations. Plaintiffs instead submit only two self-serving declarations
 8 about their own limited experience at one SCI Direct office, being Sherman Oaks.
 9 This does nothing to show there are alleged common violations throughout the
 10 state of California. Without more, the commonality requirement is not met.

11 **B. Plaintiffs cannot prove typicality in the class for the same**
 12 **reasons as commonality.**

13 Under Rule 23(a)(3), a putative class representative's claims or defenses
 14 must be typical of the claims or defenses of the class. Courts assess typicality by
 15 determining "whether other members have the same or similar injury, whether the
 16 action is based on conduct which is not unique to the named plaintiffs, and
 17 whether other class members have been injured by the same course of conduct."
 18 *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). "The typicality
 19 and commonality requirements 'tend to merge' because '[b]oth serve as
 20 guideposts for determining whether under the particular circumstances
 21 maintenance of a class action is economical and whether the named plaintiff's
 22 claim and the class claims are so interrelated that the interests of the class
 23 members will be fairly and adequately protected in their absence.'" *Villapando*,
 24 303 F.R.D. at 606 (quoting *Dukes*, 564 U.S. at 346 n. 5).

25 In the *Villapando* case relied on by Plaintiffs, the court again imposed the
 26 same qualification on typicality as that on commonality – namely, that if a driver
 27 never made deliveries or had an assistant make the deliveries, the driver would

1 not be able to establish labor code violations or damages stemming from those
2 violations. *Id.* at 606-07.

3 Here, the qualification in *Villapando* prevents a finding of typicality for the
4 same reason that Plaintiffs cannot establish commonality. Plaintiffs' claims are
5 not so interrelated that the putative class members will be fairly and adequately
6 related. Specifically, Ms. Romano has made no representation that she employed
7 an assistant, as discussed in *Villapando*, whereas it is undisputed that other ISRs
8 indeed utilized assistants to complete their sales, including making calls and
9 scheduling meetings with potential customers. Ex. 4 at 16. The claims between
10 Ms. Romano and those who employed assistants, for example, will not be
11 interrelated because those ISRs with assistants not only have demonstrate the
12 activities they completed as opposed to their assistants in making sales, but also
13 the respective time spent by each in doing so. Ms. Romano's wage-and-hour
14 claims will not require this. As such, Plaintiffs have not met the typicality
15 requirement.

16 **C. Plaintiffs cannot satisfy Rule 23(b)(2) or Rule 23(b)(3).**

17 **i. The relief requested by Plaintiffs relates predominantly to**
18 **money damages.**

19 Plaintiffs seek to have their putative class certified under both Rule
20 23(b)(2) and 23(b)(3). A class action under Rule 23(b)(2) is based on the premise
21 that "the party opposing the class has acted or refused to act on grounds that apply
22 generally to the class, so that final injunctive relief or corresponding declaratory
23 relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).
24 However, certification under this rule is not appropriate where the "relief
25 requested relates 'exclusively or predominantly to money damages.'" *Nelsen v.*
26 *King County*, 895 F.2d 1248, 1255 (9th Cir. 2000) (citation omitted). In other
27 words, the "claim for monetary damages must be secondary to the primary claim

1 for injunctive or declaratory relief.” *Molski v. Gleich*, 318 F.3d 937, 947 (9th Cir.
2 2003) (citation omitted).

3 In determining whether injunctive relief is the primary claim, a court
4 focuses on the plaintiffs’ intent in bringing suit. *Dukes*, 509 F.3d at 1186. The
5 court must be satisfied that “(1) in the absence of a possible monetary recovery,
6 reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory
7 relief sought; and (2) the injunctive or declaratory relief sought would be both
8 reasonably necessary and appropriate were the plaintiffs to succeed on the
9 merits.” *Id.* (citation omitted).

10 Once again, a case cited by Plaintiffs demonstrates the impropriety of
11 seeking a hybrid class certification here. In *Dalton v. Lee Publications, Inc.*, 270
12 F.R.D. 555, 561 (S.D. Cal. 2010), the court found that such a hybrid action is
13 inappropriate where the majority of the class consisted of former carriers.
14 Because the court could not grant injunctive relief on their behalf, leaving the
15 former carriers with only money damages, the relief requested related exclusively
16 or predominantly to money damages, precluding class certification under Rule
17 23(b)(2). *Id.*

18 Just like in *Dalton*, the relief Plaintiffs request here is predominantly for
19 money damages. For instance, their complaint explicitly states in the caption
20 “**CLASS ACTION COMPLAINT FOR DAMAGES.**” Doc. 1, Ex. A.
21 Moreover, Plaintiffs seek “restitution for the amounts of unpaid wages, including
22 interest thereon, liquidated damages and/or statutory penalties.” *Id.*, at pg. 29,
23 ¶ (q). Importantly, like the drivers in *Dalton*, the putative class here expressly
24 includes former ISRs. Doc. 62-1 at 9. In fact, the spreadsheet produced to
25 Plaintiffs showing all current and former ISRs for the Sherman Oaks office
26 indicates that 37 of the 51 total ISRs for that office are no longer active.

1 Accordingly, injunctive relief is inappropriate here because the former ISRs,
 2 which are a majority of all ISRs at the Sherman Oaks office where Ms. Romano
 3 worked, would not benefit from such relief. At most, the only potential relief
 4 available to them would be money damages, which would apply to the entire
 5 putative class.

6 **ii. Plaintiffs also fail to satisfy the predominance requirement**
 7 **under Rule 23(b)(3).**

8 The predominance test of Rule 23(b)(3) is “far more demanding” than the
 9 commonality test under Rule 23(a)(2). *Amchem Prods., Inc. v. Windsor*, 521 U.S.
 10 591, 624 (1997). Plaintiffs must demonstrate that “questions of law or fact
 11 common to class members predominate over any questions affecting only
 12 individual members” and that “a class action is superior to other available
 13 methods for fairly and efficiently adjudicating the controversy.” Fed. R. Civ. P.
 14 23(b)(3). “Considering whether ‘questions of law or fact common to class
 15 members predominate’ begins, of course, with the elements of the underlying
 16 cause of action.” *Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809
 17 (2011). However, as acknowledged by yet another case relied upon by Plaintiffs,
 18 “the issue of whether [the putative class members] were independent contractors
 19 or employees is not, by itself, a claim. It is an element of each of plaintiffs’
 20 claims, but the issue is not alone determinative of anyone claim.” *Phelps v. 3PD,*
 21 *Inc.*, 261 F.R.D. 548, 559 (D. Or. 2009).

22 Further, even if a uniform policy or practice is in place, courts recognize
 23 that “employees’ experiences under even completely uniform policies will differ.”
 24 *David v. Bankers Life & Cas. Co.*, 2015 WL 3994975, at *7 (W.D. Wash. June
 25 30, 2015); *see also Spainhower v. U.S. Bank Nat. Ass’n*, 2010 WL 1408105, at *4
 26 (C.D. Cal. Mar. 25, 2010) (holding that the determination of whether class
 27 members were misclassified would require an individualized inquiry, explaining

1 that “[w]ith substantial discretion as to how to operate one's branch comes the
 2 likelihood of substantial differences in how each member of the proposed class
 3 spent his or her workday.”).

4 *Bankers Life* is instructive of the predominance inquiry where the evidence
 5 establishes that class members enjoyed different relationships with the company
 6 despite its uniform policy. There, a putative class of insurance sales agent brought
 7 suit alleging that the company they worked for misclassified them as independent
 8 contractors. *Id.* at *1. In denying class certification, the court found that
 9 individual fact questions predominate over common questions despite the
 10 company’s uniform policy that enabled the company to have a basic level of
 11 control over the entire putative class.⁴ *Id.* at *7. Specifically, the evidence
 12 established that some agents enjoyed different relationships with the company
 13 than other class members, in that some depended more on the company than those
 14 in business for themselves who employed assistants. *Id.* at n. 28. Moreover,
 15 depending on their seniority *and their manager*, the class members were subject
 16 to differing levels of control. *Id.* (emphasis added). In holding that plaintiffs failed
 17 to meet the predominance requirement, the court explained “[t]he common
 18 evidence presented here (namely agents’ contracts) is insufficient to support a
 19 classwide finding in light of agents' varied experiences.” *Id.*

20 *Bankers* illustrates why Plaintiffs here cannot meet their burden of
 21 demonstrating that questions of law or fact common to class members
 22 predominate. Plaintiffs’ sole justification for claiming that the predominance is
 23 met is that there is an issue of whether the putative class was misclassified as
 24

25 ⁴ The common law test for determining whether an individual is an employee in
 26 Washington is similar to that in California. *Bankers Life* at *2 (citing *Donovan v.*
 27 *Sureway Cleaners*, 656 F.2d 1368, 1370 (9th Cir. 1981). Those same factors are
 28 also considered in the *Borello* test.

1 independent contractors. Doc. 62-1 at 24. Yet, *Phelps*, a case upon which
2 Plaintiffs relief, flatly rejected that position, holding “the issue is not alone
3 determinative of anyone claim.” 261 F.R.D. at 559. *Bankers* also rejected the
4 sufficiency of contract as common evidence to support the predominance inquiry,
5 where, as here, the evidence shows varied experiences of class members.

6 *Bankers* also establishes why *Gooding v. Vita-Mix*, 2017 WL 3013406
7 (C.D. Cal. July 14, 2017) is inapposite to the instant matter. There, this Court
8 found that the predominance requirement was met because “the overall claim that
9 Vita-Mix had uniform employee classification policies and pay procedures as to
10 all potential claim members makes individual actions especially prone to
11 efficiency.” However, as the court in *Bankers* held, employees’ experiences will
12 differ even if there is a completely uniform policy. 2015 WL 3994975, at *7. In
13 *Gooding*, there was no evidence of multiple offices or sales managers who had
14 wide discretion in how they chose to run their office, including the distribution of
15 leads, organization of optional trainings and “call nights” or “floor days.”
16 Whereas in *Gooding*, the employees experiences did not differ, the weight of the
17 evidence here demonstrates the individualized experiences had by each ISR in the
18 putative class.

19 Just like the agents in *Bankers*, ISRs had varied experiences based on their
20 managers. Sales managers distributed leads differently; some did so
21 geographically while others did so based on the speed of the ISR to sell or close
22 their outstanding leads. *Compare* Exs. 3, 6, 8 *with* Exs. 4, 5, 7. Some sales
23 managers requested ISRs to provide updates on the number of sales made more
24 frequently than others. *See, e.g.*, Ex. 3 at ¶ 23, Ex. 4 at ¶ 25, Ex. 6 at ¶ 11. One
25 sales manager allowed ISRs optional “floor time,” while another sales manager
26 had “call nights” where anyone could voluntarily attend. *See* Ex. 6 at ¶ 13, Ex. 4

1 at ¶ 19. Another sales manager had not gone on a ride along with an ISR within
2 the past 10 years, while other sales managers are frequently requested by ISRs to
3 accompany them on a sale. *See* Ex. 6 at ¶ 23, Ex. 4 at ¶ 24. Further, the evidence
4 also shows that some ISRs depended more on the company than other ISRs who
5 were more in business for themselves. Like one agent in *Bankers*, at least one ISR
6 who employed an assistant to make calls and schedule appointments. *See* Ex. 4 at
7 ¶ 16. ISRs were also free to hold other jobs if they chose. *See* Dkt. 63-6 at ¶ 4(d).
8 The foregoing establishes that determining whether class members were properly
9 classified as independent contractors would require an individualized inquiry into
10 each ISR's experiences that is antithetical to the predominance requirement under
11 Rule 23(b)(3).

12 The predominance inquiry is not satisfied by merely the issue of whether
13 the putative class was misclassified. Rather, the Court must also determine
14 whether the class claims and their respective elements are susceptible to common
15 proof. *See Erica P. John Fund, Inc. v. Halliburton Co.*, 563 U.S. 804, 809
16 (2011). While Plaintiffs rely extensively on *O'Connor v. Uber Technologies, Inc.*,
17 2015 WL 5138097 (N.D. Cal. Sept. 1, 2015), the case presents different facts and
18 claims as those alleged in the instant matter. First, the court there actually denied
19 certification of one of the two claims brought forth by plaintiffs. *Id.* at *15. In
20 denying the class claim for failure to reimburse drivers for business expenses, the
21 court explained that class representative's decision to pursue the main category of
22 vehicle operating expenses while abandoning other expenses that class members
23 might have raised adequacy of representation concerns that precluded
24 certification. *Id.* As to the tip claim certified in *O'Connor*, the court observed that
25 Plaintiff would be required to show that Uber included a tip or gratuity in the
26 fares it charged to its riders, but that Uber never paid these tips to its drivers. *Id.* at

1 *9. Because Uber admitted that it never gave any driver a tip, the court was thus
2 able to resolve liability on a classwide basis. *Id.*

3 Unlike the tip claim in *O'Connor*, the ten claims Plaintiffs seek to have
4 certified present substantial and individualized issues in determining whether the
5 elements of those claims have been satisfied. Even assuming *arguendo* that that
6 ISR misclassification would be susceptible to classwide proof, it does not mean
7 that the putative class members automatically satisfy the elements of proving
8 liability under the Cal. Lab. Code for failure to pay overtime compensation,
9 failure to pay all regular wages, failure to pay minimum wages, failure to pay all
10 wages due, failure to allow and pay for meal and rest breaks, failure to pay all
11 wages due at discharge, failure to provide itemized wage statements, or failure to
12 reimburse business expenses.

13 For example, to prove a failure to pay overtime compensation under Cal.
14 Lab. Code. § 510, a class member must establish that he or she either worked
15 more than eight hours per day or forty hours per week. Further, to be eligible for
16 overtime wages at twice the regular rate of pay, a class member must establish
17 that he or she worked more than twelve hours on a particular day. *Id.* To establish
18 a failure to provide meal periods under Cal. Lab. Code § 512, an ISR will need to
19 demonstrate that on a particular day, he or she worked more than five hours *and*
20 that SCI Directs did not permit the ISR to take a meal break. Similarly, for a
21 failure to pay minimum wage, Cal. Lab. Code § 1194 requires proof of the hours
22 worked by the ISR and the amount he or she was compensated. Because ISRs
23 were free to determine the hours of they worked and not required to report such
24 hours to SCI Directs, there is no common method to determine the actual hours
25 worked by each ISR necessary to satisfy the predominance requirement under
26 Rule 23(b)(3).

1 Surprisingly, the cases cited by Plaintiffs demonstrate that their claims for
2 Cal. Labor Code violations require individualize inquiry such the common issues
3 of law or fact do not predominate. In particular, with respect to Plaintiffs' claim
4 for failure to reimburse business expenses under Cal. Lab. Code § 2802, the court
5 in *Guifu Li v. A Perfect Franchise, Inc.*, 2011 WL 4635198, at *14 (N.D. Cal.
6 Oct. 5, 2011), held that the allegation that that class members had to purchase a
7 variety of items in order to perform their duties was not susceptible to resolution
8 by common proof because, "for each item claimed, an inquiry into the merits
9 looks to whether the expenditure was necessary in direct consequence to the
10 discharge of [the putative class members'] duties, and inquiry which would likely
11 be fact intensive."

12 Plaintiffs also rely on *Norris-Wilson v. Delta-T Grp., Inc.*, 270 F.R.D. 596,
13 609-10 (S.D. Cal. 2010), in which the court declined to certify the putative class's
14 meal-and-rest period and expense reimbursement claims. Much like *Guifu*, *Norris*
15 denied certification of the putative class's claim for failure to reimburse business
16 expenses under Cal. Lab. Code § 2802 and Rule 23(b)(3) because:

17 [T]he putative class here includes a range of behavioral healthcare
18 professionals who worked at a range of client sites performing a wide
19 range of services. It is hard to see how the expenses they incurred in
20 the process could be ascertained in one fell swoop, or even several fell
21 swoops. The question necessarily requires a worker-by-worker, highly
22 individual analysis. It isn't even clear that expenses were in the same
23 ballpark across the class.
24

1 *Id.* at 610. (quotations and citation omitted). The court concluded that “[s]uch an
2 expansive and varied list of expenditures for which Plaintiffs seek reimbursement
3 is not suitable for class treatment.” *Id.*

4 The *Norris* Court also denied the class’s meal and rest break claims
5 because the class members weren’t employed in a single location, performed a
6 range of duties under a range of different circumstances. *Id.* at 609. (citing *Brown*
7 *v. Fed. Ex. Corp.*, 249 F.R.D. 580 (C.D.Cal. 2008) (refusing to certify a class with
8 meal and rest break claims because the drivers were dispersed across many
9 different facilities, drove different routes, were subjected to different levels of
10 monitoring, had different delivery duties, and were busy at different times
11 throughout the day).

12 Just like in *Norris* and *Brown*, Plaintiffs’ claims are not susceptible to
13 common proof. ISRs were employed in multiple locations across California, run
14 by numerous sales managers whose management styles widely differed. *See*
15 *generally* Exs. 3-8. Based on the location, leads were distributed differently,
16 office-specific and optional “call nights” or “floor days” were used, and each ISR
17 set their own schedule and were thus busy at different times throughout the day.
18 *Id.*; *see also* Plaintiffs’ Exhibit 5, 6, and 30 to Friedman Decl., at ¶ 5(b).
19 Moreover, Plaintiffs make no effort to even provide definite and identifiable
20 categories of expenses for which they allege they are entitled to reimbursement,
21 as required by *Norris*. Further, it is certainly possible that some ISRs may have
22 never worked even close to eight hours per day or forty hours per week. And the
23 only evidence of any hours worked by ISRs are the self-serving declarations of
24 Plaintiffs. As the court explained in another case cited by Plaintiffs, “In
25 considering a motion for class certification, the substantive allegations of the
26 complaint are accepted as true, but the court need not accept conclusory or

1 generic allegations regarding the suitability of the litigation for resolution through
 2 a class action.” *Bowerman v. Field Asset Servs., Inc.*, 2015 WL 1321883, at *3
 3 (N.D. Cal. Mar. 24, 2015).

4 In addition to Plaintiffs’ claims requiring an individualized inquiry into
 5 many aspects of each ISRs performance, Defendant is also asserting a defense
 6 that Plaintiffs were “outside salespersons,” exempt from statutory overtime,
 7 minimum wage, and meal-and-rest-period requirements under Cal. La. Code
 8 § 1171 and IWC Wage Order No. 7-2001(1)(C). Pursuant to the IWC Wage
 9 order, an “outside salesperson” is one “who customarily and regularly works
 10 more than half the working time away from the employer's place of business
 11 selling tangible or intangible items or obtaining orders or contracts for products,
 12 services, or use of facilities.” Wage Order No. 7-2001(2)(J). Courts have
 13 construed the California definition as requiring that the court inquire “first and
 14 foremost, how the employee actually spends his or her time.” *Duran v. U.S. Bank*
 15 *Nat. Assn.*, 59 Cal. 4th 1, 26 (2014).

16 The application of this defense again depends on individualized inquiries
 17 into whether a specific ISR customarily and regularly worked more than 50% of
 18 his or her time away from Defendant’s offices. Because this requires a
 19 determination of how each ISR actually spent their time, and because ISRs were
 20 not required to report the hours and days they worked, individual questions of fact
 21 predominate. As such, Plaintiffs cannot meet their burden of meeting Rule
 22 23(b)(3)’s predominance requirement.

23 **iii. Plaintiffs cannot show that show that a class action is the**
 24 **superior method to adjudicating this matter.**

25 In addition to demonstrating that common issues of fact or law
 26 predominate, Rule 23(b)(3) also requires Plaintiffs to establish that “a class action

1 is superior to other available methods for fairly and efficiently adjudicating the
2 controversy.” This involves the Court looking at four factors:

3 (A) the class members’ interests in individually controlling the
4 prosecution or defense of separate actions; (B) the extent and nature
5 of any litigation concerning the controversy already begun by or
6 against class members; (C) the desirability or undesirability of
7 concentrating the litigation of the claims in the particular forum; and
8 (D) the likely difficulties in managing a class action.

9 *Id.*

10 Here, Plaintiffs have not demonstrated that a class action would be
11 manageable given the predominance of individual issues and the existence of
12 other litigation already begun by class members. Normally, when a plaintiff fails
13 to meet the predominance requirement, the court need not address the superiority
14 requirement. *See In re High-Tech Emps. Antitrust Litig.*, 289 F.R.D. 555, 563–64
15 (N.D. Cal. 2013). “If each class member has to litigate numerous and substantial
16 separate issues to establish his or her right to recover individually, a class action
17 is not ‘superior.’” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1192 (9th
18 Cir. 2001). “Trying [a] lawsuit as a class action presents manageability issues
19 [where] individual inquiries [are] necessary to establish SCI Direct’s liability for
20 each of the putative class members.” *Soares v. Flowers Foods, Inc.*, 320 F.R.D.
21 464, 484 (N.D. Cal 2017) (holding that class action was not superior because a
22 classwide trial would be derailed by individualized inquiries into whether, when,
23 and for how many hours each [class member] “personally serviced” her route,
24 making a class action no more efficient or convenient than numerous individual
25 trials).

1 With respect to “the extent and nature of any litigation concerning the
2 controversy already begun by or against class members,” the Ninth Circuit
3 explained:

4 This factor is intended to serve the purpose of assuring judicial
5 economy and reducing the possibility of multiple lawsuits.... If the
6 court finds that several other actions already are pending and that a
7 clear threat of multiplicity and a risk of inconsistent adjudications
8 actually exist, a class action may not be appropriate since, unless the
9 other suits can be enjoined, a Rule 23 proceeding only might create
10 one more action.... Moreover, the existence of litigation indicates that
11 some of the interested parties have decided that individual actions are
12 an acceptable way to proceed, and even may consider them preferable
13 to a class action. Rather than allowing the class action to go forward,
14 the court may encourage the class members who have instituted the
15 Rule 23(b)(3) action to intervene in the other proceedings.

16
17 *Zinser*, 253 F.3d at 1191 (citation omitted).

18 In addition to the extensive individual factors among the putative class
19 members here discussed in the predominance analysis, individuals who would be
20 considered class members have already begun litigation on their own behalf. SCI
21 Direct has provided Plaintiffs and this Court notice of three other lawsuits
22 brought by ISRs, all of whom allege wrongful misclassification and Cal. Lab.
23 Code violations. *See* Doc. 55. Finally, because these actions present the same
24 issues of misclassification and labor code violations, there is a clear threat of
25 multiplicity and a risk of inconsistent adjudications against SCI Directs. In all,
26 this class action is neither manageable nor superior to other available methods.

1 Given the foregoing, especially the overwhelming existence of individual
2 issues of fact needed for ISRs to establish both liability and damages for any of
3 the ten Cal. Lab. Code claims, Plaintiffs' action is not suitable for certification
4 under Rule 23(b)(3).

5 **IV. CONCLUSION**

6 A class may be certified only if the Court is satisfied after a rigorous
7 analysis that every prerequisite of Fed. R. Civ. P. 23 has been satisfied. A failure
8 to meet even one prerequisite is fatal to class certification. This Court should not
9 allow Plaintiffs' suit to be certified as a hybrid class action. Because Plaintiffs'
10 claim for injunctive relief is secondary to damages, they cannot proceed to be
11 certified under Rule 23(b)(2). Moreover, in addition to failing to satisfy the
12 commonality and typicality requirements under Rule 23(a), the evidence
13 abundantly shows that Plaintiffs cannot meet the far more demanding requirement
14 of predominance under Rule 23(b)(3). Therefore, SCI Directs respectfully request
15 this Court to deny Plaintiffs' class certification on all claims.

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17 DATED this 14th day of November, 2017.
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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2017, I caused the foregoing document to be filed electronically with the Clerk of Court using the ECF system and e-served this same date to the following:

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